SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1466

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, ETC., ET AL.,
Petitioners,

vs.

MICHAEL L. SHAKMAN AND PAUL M. LURIE, ETC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, The Democratic Organization of Cook County, a corporation; Democratic County Central Committee of Cook County; City of Chicago, a municipal corporation; Richard J. Daley, individually and as President of the Democratic Organization of Cook County, Chairman of the Democratic County Central Committee of Cook County, Mayor of the City of Chicago and Democratic Party Ward Committeeman for the Eleventh Ward of the City of Chicago; Mathew Bieszczat, individually and as Secretary of the Democratic Organization of Cook County, Secretary of the Democratic County Central Committee of Cook County, member of the Board of County Commissioners of Cook County and Democratic Party Ward Committee-

man for the Twenty-Sixth Ward of the City of Chicago; Claude W. B. Holman, individually and as Democratic Party Ward Committeeman for the Fourth Ward of the City of Chicago; Marshall Korshak, individually and as Treasurer of the City of Chicago and as Democratic Party Ward Committeeman for the Fifth Ward of the City of Chicago; James Ronan, individually and as Democratic Party Ward Committeeman for the Seventh Ward of the City of Chicago; Kenneth W. Campbell, individually and as Democratic Party Ward Committeeman for the Twentieth Ward of the City of Chicago; George W. Dunne, individually and as President of the Board of County Commissioners of Cook County and as Democratic Party Ward Committeeman for the Forty-Second Ward of the City of Chicago; P. J. Cullerton, individually and as County Assessor of Cook County and as Democratic Party Ward Committeeman for the Thirty-Eighth Ward of the City of Chicago; Edward J. Barrett, individually and as County Clerk and as Democratic Party Ward Committeeman for the Forty-Fourth Ward of the City of Chicago; and Matthew J. Danaher, individually and as Clerk of the Circuit Court of Cook County, pray that the Court will issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a judgment of that Court dated October 23, 1970.

OPINIONS BELOW.

The 2-1 opinion of the Court of Appeals, not yet reported, appears in Appendix B hereto.

The opinion of the District Court for the Northern District of Illinois is reported at 310 F. Supp. 1398 (1969). It is reproduced in Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 23, 1970. A timely petition for rehearing in banc was denied on December 18, 1970, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the extension—considered innovative by both the majority and dissenting opinions of the Court of Appeals—of the constitutional rights recognized by this Court in *Baker* v. *Carr*, 369 U. S. 186 (1962), and its progeny, from the mechanical to the persuasion or electioneering aspects of the electoral process effected by the opinion below is unsound and inconsistent with *Baker* v. *Carr* and the tenor of the decisions of this Court.

2. Whether the decision below unconstitutionally invades the province of the legislative branch, as the dissenting judge thought.

3. Whether the relief countenanced by the decision below is, as the dissenting opinion observed, tantamount to judicial enlargement of the Federal Hatch Act (5 U. S. C. § 7321 *et seq.*) to encompass the political activities of local government employees.

4. Whether the decision below is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F. 2d 119 (1968), which held that the internal workings of a political party present a non-justiciable political question.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED.

1. CONSTITUTION OF THE UNITED STATES:

(a) First Amendment:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

(b) Fifth Amendment:

. . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

(c) Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

2. UNITED STATES CODE, TITLE 42:

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties.

* * * * *

Depriving persons of rights or privileges.

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived or having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1986. Same; action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

§ 1988. Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by

the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE.

On October 17, 1969, Respondents, Michael L. Shakman and Paul M. Lurie, filed a Complaint in the United States District Court for the Northern District of Illinois seeking (a) a declaratory judgment that the Constitution of the United States prohibits the conditioning of any public employment within the County of Cook, Illinois, upon an employee's support of any official or candidate for public office endorsed by the Democratic Party, and (b) a permanent injunction barring the Petitioners from so conditioning any such employment. The Complaint also seeks compensatory and exemplary damages and a preliminary injunction. The Complaint alleges in six (6) Counts that certain practices constitute a denial of equal protection of the law, freedom of association, freedom of speech and due process of law, in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States and the Civil Rights Act of 1871. (42 U. S. C. Sections 1983, 1985, 1986 and 1988.)

The District Court dismissed the Complaint on November 6, 1969 on the grounds that "plaintiffs lack the requisite standing to litigate this controversy" and the Complaint "is conclusory." (Appendix A, p. A8.) On October 23, 1970, the Court of Appeals for the Seventh Circuit reversed the judgment of the District Court, and remanded the cause for further proceedings, holding that the Constitution protects Respondents from the use of official power of public employees which would create a political effort in favor of certain candidates and, further, that the difficulties in the areas of proof and in devising relief do not demonstrate "a lack of judicially discoverable and manageable standards for resolving" the case. (Appendix B, p. A15.)

ARGUMENT.

This Court should grant Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the instant case because this case comes within the purview of Rule 19(b) of the Rules of the Supreme Court of the United States (adopted June 15, 1970; effective July 1, 1970). There exists an apparent conflict between the decision below and the decision of the Court of Appeals for the Eighth Circuit in *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119 (1968). The decision below also decided an important and novel question of Federal law relative to the justiciability of this cause, which law has not been, but should be, settled by this Court.

I.

THE COURT BELOW FAILED TO PROPERLY APPLY THE PRINCIPLE OF NON-JUSTICIABILITY AS WAS OUTLINED IN THE CASE OF MARBURY v. MADISON.

The issues raised in the instant complaint are political in nature and should not be subject to judicial review. The complaint is clearly a non-justiciable political question as defined in *Marbury* v. *Madison,* 1 Cranch (5 U. S.) 137 (1803). Many of the defendants herein are elected public officials. Surely, the historic words of Chief Justice Marshall in *Marbury* v. *Madison* (at 165, 166), apply to these defendants to take them out of this lawsuit:

> "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To

aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer can never be examinable by the courts.

* * * * *

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."

In like manner, where the legislative branch has not imposed on the executive civil service regulations as to the appointment of certain officers and the hiring and dismissal of certain employees, then the tenure of such persons is in the sole discretion of the executive and is examinable only politically.

This is not corruption, this is not unreasonable. Parties stand for diverse policies, philosophies, interests. If the voters choose candidates of one party in preference to those of another, it usually means that the voters do not simply prefer the successful candidates as individuals; it means that the majority of the voters prefer certain pol-

icies and political philosophies and favor emphasis on and pursuit of certain interests rather than others. The administration of preferred policies, even on the lowest echelon, will benefit if it is in the hands of men sympathetic thereto, men who think along those lines, who know and are known to those who occupy the higher positions. As was noted in the case of *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119 (1968), at page 120, "[t]he courts, generally and consistently, have been reluctant to interfere with the internal operations of a political party."

This is in accord with the principle enunciated by the Supreme Court in *Sweezy* v. *New Hampshire,* 354 U. S. 234, at 250 (1957):

> "Exercise of [First Amendment] freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."

II.

THE DECISION BELOW UNCONSTITUTIONALLY INVADES THE PROVINCE OF THE LEGISLATIVE BRANCH.

The dissenting Chief Judge felt the decision below invades the province of the legislature. (Appendix B, p. A16.)

The tripartite division of the federal government is as much a part of the Constitution as is the equal protection clause of the Fourteenth Amendment. The state government of Illinois is modeled on the federal government, and the Illinois Constitution, imitating the federal, structures state government on a tripartite plan. In areas of state law and jurisdiction, the prerogatives of the state legislature are as entitled to such respect as is the Congress in the federal area.

"The nonjusticiability of a political question is," accord-

ing to *Baker* v. *Carr*, 369 U. S. 186, at 210 (1962), "primarily a function of the separation of powers." Three of the six criteria, laid down in that celebrated decision (at 217) as identifying a case involving a political question as non-justiciable, relate to the doctrine of separation of powers: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; and (3) the impossibility of a court's independent resolution without expressing lack of the respect due coordinate branches of government.

The Illinois General Assembly has shown itself well able and willing to make policy decisions and formulate guidelines in the area sought to be invaded by plaintiffs' complaint. The legislative branch has enacted extensive civil service statutes such as Ill. Rev. Stat. 1969, ch. 24, §§ 10-1-1 to 10-1-48 (civil service in cities). Section 10-1-31 provides:

> "No officer or employee of such municipality shall discharge or degrade or promote, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten to do so for giving or withholding or neglecting to make any contribution of money or other valuable thing for any party or political purpose, or for refusal or neglect to render any party or political service."

If amplification of such measures is needed in Illinois, the remedy lies in the Illinois General Assembly.

The dissenting Chief Judge was correct in his apprehension (Appendix B, p. A16) that:

> "In my opinion this case presents a nonjusticiable controversy in the sense that it involves a 'political question'—one that should be dealt with by the state legislature and not by the courts."

III.

THE RELIEF COUNTENANCED BY THE DECISION BELOW, AS THE DISSENTING OPINION OBSERVED (APPENDIX B, P. A18), IS TANTAMOUNT TO JUDICIAL ENLARGEMENT OF THE FEDERAL HATCH ACT (5 U. S. C. § 7321 ET SEQ.) TO ENCOMPASS THE POLITICAL ACTIVITY OF LOCAL GOVERNMENT EMPLOYEES.

In upholding the Hatch Act many years ago, in *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), this Court stated (at 95):

> "Of course, the question of the need for this regulation is for other branches of government rather than the courts. Our duty in this case ends if the Hatch Act provision under examination is constitutional."

The enormity of the rule permitting restriction of the political activity of government employees outside working hours, enunciated in *United Public Workers* v. *Mitchell,* is itself open to question. It is at least arguable that the strong dissents in that case (at 105-126) are more in harmony with the general tenor of this Court's First Amendment decisions in the interim since *United Public Workers* was decided than the 1947 majority.

The petitioners are specifically raising here the point that the relief prayed for in the complaint herein, and apparently approved in principle by the opinion of the Court of Appeals, would be violative of the First Amendment rights of local government employees and officials. This issue was duly raised by the petitioners below. (Appellees' Brief of City of Chicago, *et al.,* in Court of Appeals, pp. 37-39.)

As Mr. Justice Black, dissenting in *United Public Workers* v. *Mitchell,* warned (at 111, 112):

> "Legislation which muzzles several million citizens

threatens popular government, not only because it injures the individuals muzzled, but also because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be proscribed in the interest of 'clean politics' and public administration. But I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his and his fellow citizens' votes are counted. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly and petition. . . .

"There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs. They, like other citizens, pay taxes and serve their country in peace and in war. The taxes they pay and the wars in which they fight are determined by the elected spokesmen of all the people. They come from the same homes, communities, schools, churches, and colleges as do the other citizens. I think the Constitution guarantees to them the same right that other groups of good citizens have to engage in activities which decide who their elected representatives shall be."

IV.

THIS COURT SHOULD RESOLVE THE APPARENT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN IRISH v. DEMOCRATIC-FARMER-LABOR PARTY OF MINNESOTA, 399 F. 2d 119 (1968).

The Court of Appeals for the Eighth Circuit has held that the internal operation of a political party will not be interfered with by the judiciary. The Court in the instant case has obviously reached an opposite conclusion since by its decision it announces its preparedness to enter into the operation, management and control of political parties. It is obvious that this Court should resolve the conflict between these two decisions.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DISTRICT COURT,

N. D. Illinois, E. D.,

Nov. 6, 1969.

Michael L. SHAKMAN and Paul M. Lurie, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

The DEMOCRATIC ORGANIZATION OF COOK COUNTY, a corporation, et al.,

Defendants.

No. 69 C 2145.

MEMORANDUM OPINION.

MAROVITZ, *District Judge.*

Plaintiffs' Preliminary Motions,
Defendants' Motion to Dismiss.

This is a class action which alleges deprivations of freedoms of speech and association as well as due process and equal protection of the law in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution and of certain civil rights statutes, 42 U. S. C. §§ 1983,

1985, 1986, 1988, arising from an alleged political patronage system. Plaintiff Shakman is an independent (not endorsed by any political party) candidate for Delegate to the Illinois Constitutional Convention. Plaintiff Lurie is one of his supporters. Defendants are Democratic party organizations and various officials of those organizations, the City of Chicago, and various officials of the City and of Cook County, Illinois.

In this six count complaint, Counts I and IV are brought by Shakman as a candidate for public office, Counts II and V are brought by both plaintiffs as voters, and Counts III and VI are brought by both plaintiffs as taxpayers. Counts IV, V, and VI differ from Counts I, II, and III respectively in alleging conspiracy to commit the acts complained of in the lower numbered counts. The various counts are also brought on behalf of all others similarly situated. Plaintiffs seek declaratory and injunctive relief plus compensatory and exemplary damages.

All defendants have filed multifaceted motions to dismiss this complaint. Some of the reasons set forth by defendants are without merit. Plaintiffs have not inexcusably delayed instituting this action and are not barred by laches. *Loverich* v. *Warner*, 118 F. 2d 690, 693 (3d Cir. 1941). Similarly, the complaint cannot be dismissed because the motion for preliminary injunction was not accompanied by a bond. Under the federal rules, security is not required unless and until the equitable relief is to be granted. Rule 65(c), F. R. Civ. P.; 7 Moore's Federal Practice Ch. 65, ¶ 65.09, at 1656 (1968).

A considerably more serious issue is raised by defendants when they suggest that the subject matter of this action involves a political question which, therefore, renders the lawsuit non-justiciable. The non-justiciability of political questions is a doctrine which extends back to *Marbury* v.

Madison, 1 Cranch (5 U. S.) 137, 164-66 (1803). Further, there can be no doubt that this complaint involves political matters. Plaintiffs have alleged that defendants control and exert coercion over patronage employees, who are defined as those persons employed by Chicago and Cook County governmental entities, hired on the basis of political support and not protected by civil service or otherwise against arbitrary discharge from employment. The complaint further alleges that these employees are required to take time off from their jobs in order to perform political work, for which they are paid with public funds. As a result of this alleged misuse of public funds and personnel, the rights of the Democratic patronage employees are allegedly infringed in that they may not associate with plaintiff candidate, speak on his behalf, vote freely, or refuse to support defendant political organizations. Further alleged unlawful results of the patronage system are that plaintiff candidate is deprived of the right to associate with these employees, that plaintiff cannot express himself through patronage employees, that plaintiff's supporters cannot have their votes cast effectively, that the votes of plaintiff and his supporters are debased, that the election in which plaintiff is running will not be determined by votes freely cast, that plaintiff is forced to support political organizations, policies, programs, and candidates to which he is opposed, and that the electoral process is not rudimentarily fair or free of substantial political interference. Complaint, ¶ 38.

That these allegations are obviously politically oriented does not automatically resolve the motion to dismiss for if the political question doctrine is of long duration, it is also of increasingly limited scope. In recent years, the doctrine has been considerably narrowed. Thus the judiciary has considered politically tainted issues of reapportionment, e.g., *Reynolds* v. *Sims,* 377 U. S. 533 (1964),

Baker v. *Carr,* 369 U. S. 186 (1962), petitioning for a place on a ballot, e.g., *Moore* v. *Ogilvie,* 394 U. S. 814 (1969), *Williams* v. *Rhodes,* 393 U. S. 23 (1969), ballot position, e.g., *Weisberg* v. *Powell,* 417 F. 2d 388 (7th Cir. Oct. 3, 1969), and discrimination in party primaries, e.g., *Terry* v. *Adams,* 345 U S. 461 (1953), *Smith* v. *Allwright,* 321 U. S. 649 (1944). At the same time, courts have maintained a reluctance to interfere with the strictly internal operations of a political party. *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119, 120 (8th Cir. 1968); *Lynch* v. *Torquato,* 343 F. 2d 370 (3d Cir. 1965).

A determination as to the justiciability of the political issues in this case in the light of the standards set forth in *Baker* v. *Carr,* 369 U. S. 186, 209, 217, 226 (1962), need not be made, however, because plaintiffs lack the requisite standing to litigate this controversy. Assuming for the moment that plaintiff's complaint is well pleaded, which assumption is questionable in view of the vague conclusory allegations, and further accepting for the purposes of this motion similar allegations that thousands of patronage employees are being coerced into making involuntary contributions of time and money and that they are being deprived of their right to associate with, work for, contribute money to and vote for plaintiff candidate (Complaint, ¶ 39), the proper parties to assert that those deprivations amount to unlawful violations of their civil rights are the patronage employees, not plaintiff. *Cf. Tileston* v. *Ullman,* 318 U. S. 44, 46 (1943). Plaintiff has asserted that "these employees are not free to assert themselves since they believe that to do so will lead to the loss of their patronage jobs or other punishment in said jobs." Complaint, ¶ 39. Nevertheless, the issues presented are of such a serious nature and have a potential impact across the country in local, state, and national affiairs, that we cannot allow self-appointed representatives of other persons federal rights,

no matter how decent their intentions, to attempt to remedy the alleged wrongdoing. If the patronage system does concern upwards of 30,000 persons (Complaint, ¶ 27), has existed for "many years" (*Id.*), and is as coercive and obnoxious as is claimed, there should be some patronage employees willing and able to assert their rights for themselves and their class. Any other rule would risk improper representation and prosecution of the claims of these employees to say nothing of creating raising questions concerning the binding nature of a decision affecting persons not before the court. The rule prohibiting reliance on another's constitutional rights is admittedly a rule of self-restraint which may be disregarded in unique situations where, for instance, the action of a state court might result in a denial of constitutional rights to the absent party, *Barrows* v. *Jackson,* 346 U. S. 249, 257 (1953). In the instant case, we know of no similar impediment to the attempted enforcement of an aggrieved party's civil rights.

Of course, unlike the *Tileston* case, plaintiffs have alleged deprivations of their own rights. Compare, *Tileston* v. *Ullman,* 318 U. S. 44, 46 (1943). Yet, these asserted rights are not infringed directly, but derivatively, i.e., because rights of the patronage employees are allegedly infringed. Thus, Candidate Shakman alleges he is deprived of his freedom of speech and association because certain patronage employees are unlawfully deterred from associating with or speaking or working for him. Recognizing that standing "has been, and remains, one of the most enigmatic areas of the law," *Investment Company Institute* v. *Camp,* 274 F. Supp. 624, 632 (D. D. C. 1967), we think that plaintiff is the wrong party to complain about alleged wrongs incurred by patronage workers.

Leaving aside the issue of standing to litigate, plaintiffs' complaint is subject to dismissal because it is conclusory. For purpose of testing the sufficiency of a complaint under

Rule 12(b)(6), "the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A Moore's Federal Practice Ch. 12, ¶ 12.08 at 2266-69 (1968). In the Complaint, plaintiff contends that he is deprived of the "right to associate" with certain patronage employees, yet he has never alleged that he attempted to associate with any such employee and was spurned. Similarly, plaintiff contends that he is deprived of the "right to express and espouse" his candidacy through patronage employees. Even assuming the First Amendment guarantees the right to speak through other persons' mouths, there has been no allegation that plaintiff has attempted to engage patronage employees to speak for him. Plaintiff's allegation that he is being deprived of the "right to cast his vote effectively and to have the election determined on the basis of votes so cast" is another unwarranted deduction. Plaintiff has not alleged that he or any of his supporters who are qualified to vote have been or are being denied access to the polls. Nor has plaintiff alleged that the tally of votes cast in Constitutional Convention elections is not an accurate count of the votes made by qualified voters. In a like fashion, plaintiff has also alleged that votes of himself and his supporters are "dilute(d) and debase(d)." This conclusion is unwarranted for a number of reasons: there has been no allegation that patronage employees in plaintiff's district are not entitled to vote, there is no way of precisely knowing which voter votes for which candidate, and plaintiff candidate in fact received enough votes to qualify as a candidate for the office he seeks. Similarly, the conclusion is unwarranted that votes cast in the two Constitutional Convention elections are not "freely cast." Again, no one can say for sure which voter voted for which candidate. See generally, Complaint, ¶ 38.

In addition, plaintiff has alleged that he and his sup-

porters have been deprived of a fair electoral process free of "substantial partisan interference." Neither the federal constitution nor any civil rights law prohibits legitimate activity including canvassing, poster hanging and poll watching (Complaint, ¶ 38) by partisan political personnel in an election. The patronage employees about whom plaintiff is so concerned have as much right to support the candidate of their choice as do plaintiff's supporters. No doubt plaintiff will respond in agreement, but contend that the employees are coerced. If so, then as stated earlier, it is not for plaintiff to assert the rights of others, rather it is the patronage employees' right to bring an action on their own behalf.

Plaintiff has further contended that he is "force(d) . . . to support and contribute" to a political organization to which he is opposed. In all of plaintiff's lengthy complaint, we can find no factual allegations regarding coercion as to him. The funds allegedly used by plaintiff's opponents are allegedly derived from coerced contributions from patronage employees. Complaint, ¶¶ 29, 30, 35. As plaintiff has not alleged himself to be one of these coerced contributors of time and money, the conclusion that he is forced to support policies and personnel undesirable to him is simply not justified. To the extent plaintiff complains that taxpaying is a compelled involuntary contribution to defendants and their policies, the complaint fails to state a cause of action. Payment of taxes cannot be refused because of disagreement with governmental policies, whether they include school busing, law enforcement or anything else. The mere fact that some individual defendants are not only government officials, but also political leaders does not alter the propriety of paying properly assessed taxes.

Finally, plaintiff also alleges that the acts of the defendants constitute "gross and invidious discrimination" against plaintiff as a candidate and voter. However, the

relationship between the acts alleged and the result alleged is not apparent. Plaintiff is not entitled to the support of any or all political parties or their supporters. To allege that they deny him aid or oppose him may indicate a lot of things, but one of them is not unlawful discrimination.

In conclusion, viewed charitably, the complaint makes several serious charges regarding the direct deprivation of rights of a class of persons characterized as Democratic patronage employees. Whether or not the complaint can be said to state a cause of action on their behalf need not be considered presently, because those employees are not before this court. Further, given the gravity of the charges and the absence of any allegation that plaintiff fairly represents the class of allegedly aggrieved employees, we find that plaintiff does not have standing to assert the alleged violations of the rights of said employees as set forth in the Complaint, ¶ 39.

Nor do we think the complaint can be saved because plaintiff has alleged that the harm done to the patronage employees also harms him. The violations charged in the Complaint, ¶ 38 are too conclusory to support a cause of action upon which relief may be granted. Plaintiff has simply not alleged facts sufficient to warrant the deductions and charges of alleged deprivation of rights as to him and his supporters.

Plaintiff's motion for injunctive relief is denied. Defendants' motion to dismiss is granted.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

SEPTEMBER TERM, 1969 — JANUARY SESSION, 1970

No. 18043

MICHAEL L. SHAKMAN and PAUL M. LURIE, *Plaintiffs-Appellants,*

vs.

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OCTOBER 23, 1970.

Before SWYGERT, *Chief Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* This action challenges the use of patronage in the city of Chicago and Cook County in a manner which allegedly puts at an electoral disadvantage those who desire the election of candidates in opposition to those in power. In briefest outline, plaintiffs allege that officers of the city and county require city and county employees, as a condition of holding their jobs and drawing their salaries from the public treasuries, to furnish votes, campaign work, and money to elect candidates chosen by the regular democratic organization,

and that this practice makes more difficult and often prevents the election of other candidates.

The district court dismissed the complaint and plaintiffs appealed.

The two plaintiffs allege that they are residents, voters, and taxpayers within the 24th state senatorial district, within the city of Chicago and Cook County. Plaintiff Shakman was a candidate, not endorsed by any party, at the election held November 18, 1969 for delegates to the Illinois constitutional convention. Plaintiff Lurie supported Shakman. This action was commenced about a month before the election. Although the particular election is over, the practices challenged are allegedly of a continuing nature, and the case is not moot.[1]

Plaintiffs set out six counts, so as separately to seek redress for deprivation of constitutional rights on behalf of (1) Shakman, and all other independent candidates, including those at future elections, as candidates; (2) both plaintiffs, and all others similarly situated, as voters; (3) both plaintiffs, and all others similarly situated, as taxpayers; and separately to predicate each such claim upon an averment of conspiracy to effect such deprivation.

The defendants include the mayor and treasurer of the city, the president of the board of county commissioners, the county assessor, the county clerk, and the clerk of circuit court. There has been no argument that these defendants are not acting under color of law in making the appointments which allegedly implement the patronage system under attack. The democratic county central committee, which is a statutory party organ, several of its members, several aldermen and county commissioners, and a not for profit corporation known as The Democratic Organization of Cook County are additional defendants.

1. Cf. *Moore* v. *Ogilvie* (1969), 394 U. S. 814, 816.

It is alleged that all conspired to deprive plaintiffs of rights.

Jurisdiction is claimed under 28 U. S. C. § 1331, of a controversy arising under the constitution, and a jurisdictional amount is alleged. Jurisdiction is also claimed under 28 U. S. C. § 1343(3) of an action to redress the deprivation under color of state law, of rights secured by the constitution. Assuming justiciability, the existence of jurisdiction, at least under § 1343(3), is clear.[2]

The complaint defines a democratic patronage employee (DPE) as a person employed by the city or county on the basis of his political support of the county democratic organization, of which the mayor is president, and who is not protected by law against arbitrary discharge. It is alleged that there are between 8,000 and 30,000 DPE's; that many are hired on a basis where one's employment must be renewed each several months if it is to continue; that most DPE's are required, as a condition of keeping their jobs, or in order to escape discipline, to contribute money to the county democratic organization, or its affiliates, or endorse candidates, and to do political work for such organizations and candidates. Some of such allegedly coerced work is done during regular working hours and some on the DPE's own time. The defendants, it is alleged, coerce DPEs by this means to give votes, political support, campaign work, and money to candidates endorsed by the organization and its affiliates.

Plaintiffs ask, among other things, for a declaration that the practices of defendants violate constitutional and other federal rights of candidates, voters, and taxpayers of Chicago, an injunction against those practices, and damages.

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2. See *Bell* v. *Hood* (1946), 327 U. S. 678; *Baker* v. *Carr* (1962), 369 U. S. 186, 198.

One of the reasons given by the district court for dismissing the complaint is that plaintiffs lack standing to seek redress for the injury to the rights of the DPEs resulting from the alleged coercion. Plaintiffs point out that there are decisions permitting vicarious vindication of constitutional rights for reasons of policy.[3] But here, in any event, plaintiffs are seeking redress for injuries to their own interests and the interests of others similarly situated. Assuming the truth of plaintiffs' averments, and assuming that interests of theirs which are allegedly injured are rights, privileges, or immunities secured by the federal constitution, their standing to bring a § 1983 or § 1985 action is apparent.[4]

Plaintiffs also aver that they are taxpayers, challenging the misuse of tax funds in that DPEs are allegedly required, as a condition of continuing to receive their compensation out of public money, to vote for and assist candidates selected by defendants and opposed by plaintiffs. Plaintiffs are asserting that the practice causes injury to their interests as candidates and voters, and if those interests are constitutionally protected from the type of injury alleged, it will be unnecessary to decide whether their taxpayer interest alone would give them standing.[5]

The other reason given by the district court for dismissing the complaint is that it is conclusory. The court pointed to a number of assertions in the portion of the complaint where the pleader attempted to describe the impact of the practice complained of on plaintiffs' right of association, right to express one's self as a candidate,

3. See examples cited in *Smith* v. *Board of Education of Morrilton Sch. Dist. No. 32* (8th Cir., 1966), 365 F. 2d 770, 776.

4. *Baker* v. *Carr* (1962), 369 U. S. 186, 204.

5. See *Doremus* v. *Board of Education* (1952), 342 U. S. 429, 434.

right to vote effectively, and the like. The district court did not agree, and we do not, with much of plaintiffs' expression of the legal analysis of such impact. Most § 1983 complaints contain material in this area, and we agree that a pleader's abstract assertion that one or another constitutional right has been violated does not require the court to decide that a claim has been adequately stated.

But the averments concerning the operation of the patronage system and the disadvantage it causes to candidates and voters who attempt to use the election process to change the direction of government are factual and give adequate fair notice of the claim asserted.[6]

We consider the significant questions, unanswered to this point, to be whether these disadvantages to the interests of candidates and voters amount to deprivation of any rights, privileges, or immunities secured by the constitution, and whether for any reason this area of controversy must be deemed nonjusticiable.

It is clear that at least some aspects of the interests of candidates in an equal chance and of the interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment.

The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection.[7] "Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."[8]

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6. See 2A Moore, Federal Practice ¶ 8.13, pp. 1695-1700.

7. *Snowden* v. *Hughes* (1944), 321 U. S. 1, 8. See *Weisberg* v. *Powell* (7th Cir., 1969), 417 F. 2d 388, 392.

8. 321 U. S. 11.

The equal protection clause secures from invidious official discrimination the voter's interest in a voice in government of equal effectiveness with other voters.[9]

We acknowledge that the decisions just referred to involved mechanical aspects of the election process: *e.g.*, the right to cast a vote, a candidate's place on the ballot, and equal size in districts entitled to a representative. The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from injury resulting from inequality in election procedure.

We see no ground upon which to decide that the controversy suggested by plaintiffs' claims is nonjusticiable.

> "In the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."[10]
>
> * * *
>
> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or

9. *Baker* v. *Carr* (1962), 369 U. S. 186; *Gray* v. *Sanders* (1963), 372 U. S. 368; *Reynolds* v. *Sims* (1964), 377 U. S. 533, 565; *Carrington* v. *Rash* (1965), 380 U. S. 89; *Williams* v. *Rhodes* (1968), 393 U. S. 23; *Avery* v. *Midland County* (1968), 390 U. S. 474; *Moore* v. *Ogilvie* (1969), 394 U. S. 814; *Hadley* v. *Junior College District* (1970), 397 U. S. 50.

10. *Baker* v. *Carr* (1962), 369 U. S. 186, 198.

> the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.''[11]

One may forsee that in the areas of proof, and devising relief if the claims be proved, care will be required in order to distinguish between compelled and voluntary political support by public employees. Except to the extent some statute validly restricts political expression or activity by public employees, such individuals enjoy the same right of political association and expression, on their own time, as anyone else.

We do not view possible difficulties of the sort just mentioned as demonstrating ''a lack of judicially discoverable and manageable standards for resolving'' the case or as requiring, at the pleading stage, a decision that plaintiffs' claim is not justiciable.

Defendants rely upon the eighth circuit decision in *Irish* v. *Democratic Farmer-Labor Party of Minnesota.*[12] There the court held that there was nothing of constitutional significance in an alleged malapportionment of representation in the state convention of a political party. The court went on to say that the case presented a nonjusticiable political question. We think that the nature of the problem there, with respect to the internal operations of a political party, is sufficiently different from the problem presented in the complaint before us, that *Irish* offers no guidance here. Because of the difference, it is unnecessary to decide whether we agree with the reasoning of *Irish.*

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11. Ibid. p. 217.

12. (8th Cir., 1968), 399 F. 2d 119.

We note the argument, made by several defendants, that the complaint is fatally defective for failure to join as defendant the Republican Party. We find no merit in the proposition.

Plaintiffs have asked that in addition to reversing the order of dismissal we direct the district court to grant a preliminary injunction. We deem it inappropriate, however, at this time, to preempt the district court's discretion with respect to a preliminary injunction.

The judgment is reversed and the cause remanded for further proceedings.

SWYGERT, *Chief Judge*, dissenting.

I would sustain the district court's dismissal of the complaint, but on a ground different from those assigned by the district judge. In my opinion this case presents a nonjusticiable controversy in the sense that it involves a "political question"—one that should be dealt with by the state legislature and not by the courts.

A distinction should be drawn in this area between the rights of voters and candidates for public office to be given equal treatment by the state in the "mechanical aspects of the election process," to use Judge Fairchild's apt phrase, and remedies for alleged abuses of the persuasion or electioneering aspects of the process. For example, in *Baker* v. *Carr*, 369 U. S. 186 (1962), it was held that the citizens of a state suffer a "debasement of their votes" and thereby a denial of equal protection of the laws when the state legislature refuses or fails to allocate its legislative representation on an equal basis among the voters of the state. In *Moore* v. *Ogilvie*, 394 U. S. 814 (1968), the Supreme Court held that a state may not discriminate against the residents of the more populous sections of a state in favor

of the less populous by requiring a rigid, arbitrary number of signatures from each county on petitions for independent candidates for political office. In *Weisberg* v. *Powell,* 417 F. 2d 388 (7th Cir. 1969), this court had before it a case concerning an arbitrary and discriminatory procedure adopted by the Illinois Electoral Board in the placement on the ballot of candidates to a state constitutional convention. All three cases, which are illustrative of the decisions in this area, dealt with procedures enacted by state legislatures relating to the democratic elective process directed to attain representative government.

In the instant case we are not asked to apply the equal protection test to a legislative enactment governing the elective process or even to a deviation from such an enactment by those statutorily charged to carry out its mandate. Rather, we are asked to go one step further and hold that the conduct of a public official is constitutionally proscribed when he allegedly requires employees whom he appoints and can summarily discharge to contribute money and "public" time to the candidacy of those favored by him.

In *Baker* v. *Carr,* the Supreme Court recognized that there may be areas of activity relating to the elective process that are not justiciable because of the "inappropriateness of the subject matter for judicial consideration." The Court then set forth the applicable test: "In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." 369 U. S. at 798. When this test is applied to the claims made by plaintiffs, it is apparent that the instant case should be classified as nonjusticiable. Assuming proof of the claims, it is not difficult to contemplate the problems facing the district court in

molding a proper remedy and, perhaps more important, with its enforcement.

I agree with the observation made by defendants that the relief requested is tantamount to asking the court to enlarge the Federal Hatch Act, 5 U. S. C. §§ 7321 *et seq.*, to encompass the political activity of local government employees. Whether coverage should be extended to such employees as a matter of public policy is not the question. The question is whether a federal court should attempt to formulate "judicially discoverable and manageable standards,"[1] relating to such activity and whether it should be called on to mold a peacemeal remedy by injunctive decree.

In my judgment this case presents issues of which the courts should not take cognizance. It is a matter that should be left to the legislature.

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1. *Baker* v. *Carr*, 369 U. S. 186, 217 (1962).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1466

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, ETC., ET AL.,
Petitioners.

vs.

MICHAEL L. SHAKMAN AND PAUL M. LURIE, ETC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT OF THE CASE.

The complaint in this case was filed on October 17, 1969, in the United States District Court for the Northern District of Illinois. The complaint was dismissed without an evidentiary hearing by the District Court on November 6, 1969. That dismissal was reversed by the United States Court of Appeals for the Seventh Circuit on October 23, 1970, the case being remanded to the District Court for further proceedings. [The decision of the Court of Appeals is reported at 435 F. 2d 267 (7th Cir. 1970).] Petitions for

rehearing *in banc* were denied on December 18, 1970. The petition for a writ of certiorari seeks a review of the decision of the Court of Appeals remanding the case for further proceedings. The decision sought to be reviewed is, of course, not a final judgment; indeed, no evidentiary hearing has yet been held.

The Complaint.

Since the decision sought to be reviewed involves only the sufficiency of the complaint, it is important briefly to describe its allegations. The complaint is brought by respondent Michael L. Shakman, an independent candidate (not the candidate of any political party) for Delegate to the Illinois Constitutional Convention, and by respondent Paul M. Lurie, one of his supporters [4*, 26]. It is brought on behalf of the respondents and also as a class action on behalf of all present and future independent candidates for public office in Cook County, Illinois, as well as on behalf of classes of present and future voters and of taxpayers in Cook County [5, 26, 30]. The defendants (petitioners) are elected officials of the City of Chicago and Cook County, the Democratic County Central Committee of Cook County, officials and members of that Central Committee, the City of Chicago and a corporation known as The Democratic Organization of Cook County [5-8].

The complaint sets out six counts, all of which seek redress for deprivations of rights under the United States Constitution and the civil rights laws. One count is brought on behalf of respondent Shakman and other independent candidates for public office, including those in future elections; another count is brought on behalf of both respondents and others as voters, including those in future elections, and a third count is brought on behalf of respondents

* Unless otherwise indicated, page numbers refer to the Appendix for the Court of Appeals.

and others as taxpayers. As to each such claim, the complaint also adds in separate counts allegations that the defendants conspired to deprive plaintiffs of such rights [31-32].

Basically, the complaint alleges that many thousands of public employees are required, as a condition of obtaining and maintaining public employment, to give political support (including money and work) to the defendant partisan political organizations and officials or to their candidates for public office [11-15]. These employees are employed by the City of Chicago, the County of Cook and other state and local governmental entities in Cook County. The complaint alleges that the number of such public employees so coerced into giving such political support is between 8,000 and 30,000. It is impossible to state a more precise number, the complaint alleges, because of the concealment by the defendants and others allied with them of the facts concerning these employees [12]. Many of the jobs affected are of a clerical, ministerial or labor nature (such as truck drivers, office clerks, sewer workers, public health technicians, etc.) [12, 41, 58].

In specific, the complaint alleges that thousands of such employees are required as a condition of their public employment to contribute money (often a percentage of their wages) to defendant partisan political organizations and officials or to their candidates [13]. Also, thousands of such public employees are, it is alleged, required as a condition of their public employment to do active political campaigning in the precincts—door to door solicitation, putting up posters and the like—on behalf of the defendant political organizations and officials or their candidates [13]. These public employees are further required as a condition of such employment not to support candidates for public office opposed or not endorsed by the defendant political organizations and officials [15, 18].

The complaint still further alleges that many of such public employees are permitted and, indeed, required as a condition of their public employment to do partisan political work in support of candidates of the defendant partisan political organizations and officials on public time while being paid with public funds raised by taxation [14].

Such public employees who fail to do such political work for, or to contribute money to, the defendant partisan political organizations and officials or their candidates, or who give political support to independent candidates (such as plaintiff Shakman), are discharged from or demoted or otherwise punished in their public employment by defendants [18]. Moreover, persons who fail to give or to promise to give such political support or who fail to receive the "sponsorship" of defendant political organization officials or some other politically influential persons connected with such organizations are excluded from such public employment positions [12].

The complaint describes in detail how these public employment practices perpetrated by defendants serve to violate the constitutional rights of independent candidates for public office [19-23]. The complaint also describes how the practices violate the constitutional rights of plaintiffs, and the classes they represent, as voters and as taxpayers [19-23]. In sum, the public employment practices described in the complaint operate to create an army of political workers and a giant political treasury, all paid for with public funds, on behalf of candidates endorsed by defendant partisan political organizations and officials and in opposition to independent candidates such as plaintiff Shakman. These practices deprive plaintiffs of rights under the First, Fifth and Fourteenth Amendments to the United States Constitution and under Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code [19-23].

The election for Delegate to the Constitutional Convention has passed but, as the Court of Appeals indicated, the abuses described in the complaint are alleged to be of a continuing nature [petition A10].* The complaint seeks a declaratory judgment that the practices complained of are illegal and unconstitutional [33]. Moreover, plaintiff Shakman alleges he intends to be an independent candidate in the future, and plaintiff Lurie alleges he intends to support him in the future. Respondents and many other qualified voters frequently support and vote for independent candidates and intend to do so in the future [28]. The case, as previously stated, is also brought on behalf of classes of present and future candidates and voters as well as taxpayers [24, 28]. See *Brockington* v. *Rhodes*, 396 U. S. 41 (1969).

The complaint asks basically for preliminary and permanent injunctive relief prohibiting the conditioning of such public employment on public employees' political support (including work and money) of the defendant political organizations or of their candidates. Injunctive relief is also asked to prohibit defendants from discharging, demoting or otherwise punishing public employees in their public employment (or threatening to do so) for such employees' political beliefs or lawful political conduct. It is also sought to prohibit defendant public officials from allowing public employees to do partisan political work on public time. As previously indicated, the complaint further seeks a declaratory judgment declaring such practices illegal and unconstitutional. Plaintiffs also request money damages and other necessary relief [33-37].

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* In fact, respondent Shakman lost the election by 623 votes, out of more than 47,000 votes cast. This fact was presented to the Court of Appeals [Reply Brief 3]. Thus Shakman was defeated by a number of votes less than the probable number of public employees in the electoral district whose public employment was alleged to be conditioned on political support of Shakman's opponent [Reply Brief 3].

The District Court's Opinion.

The District Court dismissed the complaint on two grounds: the complaint was said to be "conclusory" and the plaintiffs were said to lack standing to contest the public employment practices alleged in the complaint. These two grounds were unanimously reversed by the Court of Appeals. *Neither of these grounds is presented for review by this Court.*

The Court of Appeals' Opinion.

The Court of Appeals found that the allegations of the complaint properly stated claims under the civil rights laws and the Constitution. The Court stated that, "The interests of candidates in official treatment free from intentional or purposeful discrimination are entitled to constitutional protection. . . . The equal protection clause secures from invidious official discrimination the voter's interest in a voice in government of equal effectiveness with other voters." On the basis of these principles the Court of Appeals held that the Constitution prohibited "the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs," as alleged in the complaint. [petition A14.]

The Court of Appeals further held that the alleged public employment practices imposed unconstitutional conditions on public employment. "Except to the extent some statute validly restricts political expression or activity by public employees, such individuals enjoy the same right of political association and expression, on their on time, as anyone else." [petition A15.] The Court of Appeals ordered the cause remanded for further proceedings.

ARGUMENT.

Respondents respectfully submit that a writ of certiorari should not be issued because the case is not ripe for review. Respondents further submit that the arguments given by petitioners why this case should be reviewed are based on misstatements of the nature of the case and on a failure to consider the clear preexisting law.

I. THE CASE IS NOT RIPE FOR REVIEW.

The decision of the Court of Appeals which petitioners would have this Court review is not a final judgment. Rather, it reversed the dismissal of the complaint and remanded the case to the District Court for further proceedings. No injunctive or other relief has yet been granted. As this Court has indicated, normally such non-final judgments will not be reviewed. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R. R. Co.*, 389 U. S. 327, 328 (1967), where this Court stated, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court", and *American Construction Co.* v. *Jacksonville R. R. Co.*, 148 U. S. 372, 384 (1893).

Review of the case at this stage, without the benefit of any factual record, would create the possibility of unnecessary or multiple review by this Court.

II. THE DECISION OF THE COURT OF APPEALS IMPOSES NO HATCH ACT RESTRICTIONS ON PUBLIC EMPLOYEES.

The petitioners seek to represent the case as an attempt to impose Hatch Act restrictions on public employees [petition 13]. The truth is just the opposite. Plaintiffs do not

seek to prohibit any public employees from doing any lawful political work for any party or candidate on their own time, and no such prohibition is implied in the Court of Appeals' decision. The decision below would not prohibit public employees from engaging in political activities, as does the Hatch Act. Rather, its effect is just the opposite. It would prohibit the *coercion* of public employees into working for and contributing money to one political party and its candidates and into not working for other candidates, regardless of their own desires. It would thus remove restrictions on political activities of public employees, leaving them free to engage on their own time in whatever lawful political activities they choose, or to engage in none if they so desire.

In their statement of the case, petitioners go so far in seeking to misrepresent the decision below as imposing restrictions on public employees as actually to misstate the Court's language. The petition for a writ of certiorari states (incorrectly) that the decision of the Court of Appeals held "that the Constitution protects Respondents from the use of official power *of* public employees" [petition 8, emphasis supplied]. In fact, the decision holds that the complaint states a claim as to the "misuse of official power *over* public employees" [petition A14, emphasis supplied].

III. THERE IS NO CONFLICT OF DECISIONS.

The decision below is not, as petitioners suggest, inconsistent with *Irish* v. *Democratic-Farmer-Labor Party of Minnesota,* 399 F. 2d 119 (8th Cir. 1968). In *Irish,* the Eighth Circuit held that it would not interfere with the apportionment of state political party convention seats. *Irish* does not in any way conflict with the decision below. It simply is not in point. The gravamen of the present

complaint concerns not the purely internal workings of a political party, as was involved in *Irish,* but the unconstitutional use by *public* officials of *public* employees and *public* funds.

IV. THE COURT OF APPEALS DID NOT ERR IN RULING THAT THE CASE IS JUSTICIABLE.

Petitioners submit that this Court ought to review the decision below because "the complaint is clearly a non-justiciable political question" [petition 9]. Petitioners make the remarkable assertion that the federal judiciary is prevented from examining the constitutionality of any employment conditions imposed by local governments, however offensive to First Amendment freedoms, because "the hiring and dismissal [of public employees] . . . is in the sole discretion of the executive and is examinable only politically. . . ." [petition 10]. In the papers filed in the Court of Appeals, petitioners' position was stated even more blatantly: "subject to statutory limitation, local governments may adopt the same employment practices as any individual or company." [Party's Petition for Rehearing 4.]

This is, of course, completely wrong. ". . . [T]he state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. . . . We may assume that Rachel Brawner could not constitutionally have been excluded from [employment at] the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—*that she could not have been kept out because she was a Democrat or a Methodist.*" *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 897-898 (1961) (Emphasis supplied).

Contrary to petitioners' assertion, the law, as *Cafeteria*

Workers shows, is settled that states may not make public employment subject to unconstitutional conditions. No federal case has ever held that the "political question" doctrine places such unconstitutional conduct beyond the reach of the federal courts.

In numerous cases this Court has directly considered the constitutionality of state imposed requirements for obtaining or retaining public employment and a number of such cases have held that such requirements involved judicially cognizable violations of constitutional rights. See, for example, *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) [overly broad state loyalty oath], where Mr. Justice Clark, writing for a unanimous Court, stated that while states could establish reasonable conditions on public employment, it would be unconstitutional to "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office," 344 U. S. at 191-92; also *Pickering* v. *Board of Education*, 391 U. S. 563 (1968) (school teacher dismissed for letter criticizing school board); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961) (vague loyalty oath); *Shelton* v. *Tucker*, 364 U. S. 479 (1960) (requirement of listing membership in organization); and *Bond* v. *Floyd*, 385 U. S. 116 (1966) (court had jurisdiction to consider constitutionality of failure to seat state legislator).

The decision of the Court of Appeals does not conflict with the decisions of this Court on justiciability. Rather, it is petitioners' novel and dangerous theory that the "political question" doctrine excludes judicial examination of the constitutionality of any state imposed requirements for obtaining and maintaining public employment which is in conflict with the existing decisions.

Petitioners further assert that the case involves a "political question" because the constitutionality of the state practices complained of may be dealt with only by the state

legislature. This point has, however, already been decided by this Court adversely to petitioners' contentions. *Baker* v. *Carr*, 369 U. S. 186, 210 (1962), is quite clear:

> "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"

CONCLUSION.

The decision of the Court of Appeals is totally consistent with and is required by the existing case law. Petitioners have failed to demonstrate any reason why this Court should review the decision below, particularly at this stage of the proceedings. Therefore, respondents submit that the petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1466

THE DEMOCRATIC ORGANIZATION OF COOK COUNTY, ETC., ET AL.,
Petitioners,

vs.

MICHAEL L. SHAKMAN AND PAUL M. LURIE, ETC.,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

Respondents, in their Brief in Opposition in No. 1466, raise certain new matters for the first time before this Court. It is in response to these matters that Petitioners respectfully suggest the following:

I.

THE CASE IS RIPE FOR REVIEW.

Respondents argue that the decision of the Court of Appeals "is not a final judgment" and for that reason should not be reviewed by this Court (Respondents' Br., p. 7). Respondents, however, ignore the ample precedent for granting certiorari in these circumstances.

This Court does consent to review decisions raising important jurisdictional questions when a court of appeals has reversed the granting of a motion to dismiss and has ordered the case remanded for trial. In *Land* v. *Dollar*,

330 U. S. 731, at 734 n. 2 (1947), this Court said, "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case.'" In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, at 685, n. 3 (1949), this Court repeated the same statement. Certiorari has been granted where a non-final judgment presents a novel and important question of law, which is fundamental to the further conduct of the case, and where, as here, the petitioner's position, if sustained by this Court, would terminate the litigation. *American Construction Co.* v. *Jacksonville, T & K R. Co.*, 148 U. S. 372 (1893). See also *United States* v. *General Motors Corp.*, 323 U. S. 373, at 377 (1945). In *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, at 152, 153 (1964), this Court again reiterated;

> "Under Section 1291 an appeal may be taken from any 'final' order of the district court. But as this Court often has pointed out, a decision 'final' within the meaning of Section 1291 does not necessarily mean the last order possible to be made in a case. . . . [T]he requirement of finality is to be given a 'practical rather than a technical construction'."

The two cases cited by Respondents in support of their argument that the case is not ripe for review (Respondents' Br., p. 7) contain, either actually or by reference, statements of the general principle that if a case presents questions of grave public importance or non-uniformity of federal court decisions, this Court will grant a Petition for a Writ of Certiorari. See *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258 (1916), cited in *Brotherhood of Locomotive Firemen* v. *Ranger Aroostock R. R. Co.*, 389 U. S. 327, 328 (1967); and *American Construction Co.* v. *Jacksonville R. R. Co.*, 148 U. S. 372, 383 (1893).

Neither case cited by Respondents on this point has even a superficial similarity to the case at bar.

The *Brotherhood of Locomotive Firemen* case was remanded by the Circuit Court of Appeals to determine whether or not actual contempt occurred—certainly not a question of far-reaching significance.

American Construction Co. involved two cases of receivership. The first case was held to be "neither so important in its immediate effect nor so far-reaching in its consequences" to warrant the issuance of a writ of certiorari. 148 U. S. at 385-86. The second case raised the issue of whether the decision the Circuit Court of Appeals was void because the district judge who finally heard the case was a member of the appellate panel. In that case this Court entered a rule to show cause why a writ of certiorari should not be issued.

Thus both cases are easily distinguishable from the case at bar which involves a conflict between decisions of two federal Circuit Courts of Appeal and raises questions of far-reaching importance:

(1) Will this Court regulate the internal political activities of the major political parties?

(2) Will this Court "legislate" a local Hatch Act by judicial fiat?

(3) Will this Court broaden Federal District Court jurisdiction in local disputes, *contra*, to its recent pronouncements [*Cf. Younger* v. *Harris* (October Term, 1970), 39 L. W. 4201; *Boyle* v. *Landry* (October Term, 1970), 39 L. W. 4207—both cases decided February 23, 1971]?

Since, as demonstrated in the petition, this case deals with several substantial questions of constitutional law of great public importance, and, is clearly a case of first impression, it does not fall within the purview of the cases cited by respondents.

II.

RESPONDENTS' CHARACTERIZATION OF THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS INCORRECT.

Respondents on page 6 of their Brief characterize the Seventh Circuit Court of Appeals as having acted unanimously in this case. This characterization ignores the fact that at no time during its disposition of this case did the Court of Appeals so act. The decision of that Court contained a strongly worded and well-reasoned dissent by Chief Judge Swygert (Petition, Appendix B, p. A16), and two judges of that Court voted to grant petitions for rehearing *en banc* (Petition, Appendix C, p. A19).

It should also be noted that Respondent's version of the question of standing does not clearly reflect what occurred in the lower court. The district judge held that the Respondents had no standing to represent the public employees of the City of Chicago. The Circuit Court of Appeals did not reach this particular decision on standing because it initially held that Respondent's had standing as candidates and voters in a suit "seeking redress for injuries to their own interests and the interests of others similarly situated" (Petition, Appendix B, p. A12).

It should also be noted that the Court of Appeals did not reverse in its entirety the holding of the District Judge that the complaint was conclusory. In fact, the Seventh Circuit agreed that much of the Complaint was defective, stating (Petition, Appendix B, p. A13) that:

> "The district court did not agree, and we do not, with much of plaintiffs' expression of the legal analysis of such impact."

CONCLUSION.

For the foregoing reasons and the reasons suggested in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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